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9 and USF&G, Defendants

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ALASKA AT ANCHORAGE

12 UNITED STATES OF AMERICA for the)
13 use of NORTH STAR TERMINAL &)
14 STEVEDORE COMPANY, d/b/a NORTHERN)
15 STEVEDORING & HANDLING, and NORTH)
16 STAR TERMINAL & STEVEDORE COMPANY,)
17 d/b/a Northern Stevedoring &)
18 Handling, on its own behalf,)

No. A98-009 CIV (HRH)

19 Plaintiffs,)

20 and)

21 UNITED STATES OF AMERICA for the)
22 use of SHORESIDE PETROLEUM, INC.,)
23 d/b/a Marathon Fuel Service, and)
24 SHORESIDE PETROLEUM, INC., d/b/a)
25 Marathon Fuel Service, on its own)
behalf,)

Intervening Plaintiffs,)

and)

METCO, INC.,)

Intervening Plaintiff,)

vs.)

26 NUGGET CONSTRUCTION, INC.; SPENCER)
27 ROCK PRODUCTS, INC.; UNITED)
28 STATES FIDELITY AND GUARANTY)
29 COMPANY; and ROBERT A. LAPORE,)

30 Defendants.)
31

MEMORANDUM IN SUPPORT OF
NUGGET CONSTRUCTION,
INC.'S AND UNITED STATES
FIDELITY & GUARANTY
CO., INC.'S MOTION FOR
SUMMARY JUDGMENT AGAINST
METCO, INC.

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1 Pursuant to Federal Rule of Civil Procedure 56, Defendant Nugget
2 Construction, Inc. ("Nugget") respectfully moves for summary judgment
3 on all state law claims and causes of action alleged by Intervening
4 Plaintiff/Use-Plaintiff Metco, Inc. ("Metco") in its Amended Complaint
5 filed September 22, 2005.¹ As Nugget demonstrates herein, there is no
6 genuine issue as to any material fact and Nugget is entitled to
7 summary judgment as a matter of law.

8 Introduction

9 Following the Ninth Circuit's March 3, 2005 decision in the
10 above-captioned matter denying summary judgment to all parties and
11 remanding the matter for further proceedings, Metco amended its
12 complaint to include not only its several allegations based on a
13 "telescoping" of the relationship between Metco and Nugget under the
14 Miller Act,² but also to include an exhausting number of claims under
15 Alaska state law. Metco was subsequently afforded considerable
16

17
18 ¹ To the extent that Metco asserts state law claims against Nugget's surety,
19 United States Fidelity & Guaranty Company ("USF&G"), USF&G also moves for
summary judgment on all grounds raised by Nugget herein.

20 ² In its amended complaint, Metco alleges that Nugget orchestrated a
21 remarkable conspiracy involving Nugget, USF&G, Spencer Rock Products, Inc.
22 ("Spencer Rock"), and Spencer Rock's bank for the express purpose of avoiding
23 payments to Spencer Rock's vendors. What makes this allegation even more
24 remarkable is that Metco disregards the significant and established fact
25 that, although Spencer Rock's material suppliers may have lost tens of
thousands of dollars as a result of Spencer Rock's financial downfall, Nugget
sustained losses in excess of \$1.5 million as a result of its dealings with
Spencer Rock. Although not the subject of the instant motion, Nugget will
show that Metco's allegations under the federal Miller Act are as baseless as
its state law claims addressed herein.

1 latitude to conduct additional discovery for the purpose of
2 substantiating these allegations and developing its claims.

3 One need not reflect too long upon Metco's amended complaint to
4 conclude that Metco's separate but largely overlapping state law
5 claims were plead so that it could inflate its potential recovery from
6 Nugget with a grossly disproportionate \$1,000,000 punitive damages
7 claim. Metco is certainly well aware that its punitive damages claim
8 would not be permissible if Metco were proceeding under the federal
9 Miller Act alone. Thus, to say that Metco's state law claims are
10 untimely raised is a considerable understatement, as there is
11 absolutely no reason why Metco could not have included these claims in
12 its original complaint filed approximately eight years ago.

13 Why then were these claims not included as part of Metco's
14 original complaint? The plain answer is that, at the time Metco filed
15 its original complaint, Metco believed that there were no facts to
16 substantiate such claims. Metco's inclusion of these state law claims
17 can thus reflect only an opportunistic and last-ditch effort to have
18 yet another (and much bigger) bite at the apple by continuing to
19 reinvent its theory of recovery in the wake of adverse decisions from
20 the Ninth Circuit.

21 The undisputed facts establish that: (i) Metco did not enter
22 into a contract with Nugget; (ii) Metco always believed its contract
23 was with Spencer Rock, and not Nugget; (iii) but for one insignificant
24 conversation, Metco did not have any dealings, direct or indirect,

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1 with Nugget during the course of Metco's performance; (iv) Metco never
2 pursued payment from Nugget during the course of performance; and (v)
3 Metco was never induced to perform by any act or statement of a Nugget
4 employee or representative. Nevertheless, Metco urges the Court to
5 embrace its theories based on breach of contract, promissory estoppel,
6 quasi-contract, agency, detrimental reliance, quantum meruit,
7 misrepresentation and nondisclosure, negligence, equitable
8 subordination, and constructive trust.³

9 The logical disconnect between the undisputed facts and Metco's
10 state law claims begs the following questions: How can Nugget be in
11 breach of contract when there was no express contract between Nugget
12 and Metco? How can Nugget be held to an implied-in-fact contract when
13 there was literally no interaction between Nugget and Metco during the
14 course of Metco's performance but for a single insignificant
15 conversation? Similarly, how could Metco have relied upon an act or
16 an alleged misrepresentation of Nugget, to Metco's detriment, if there
17 were literally no substantial interactions between Metco and Nugget
18 but for a single conversation? Further, how could Nugget have been
19

20 ³ Metco's Amended Complaint also includes a bad faith claim that appears to be
21 directed solely at USF&G. Metco's Amended Complaint, ¶ 38. To the extent
22 that Metco's bad faith claim is directed at Nugget, such claim is completely
23 without merit. Nugget has every right to legally defend itself against
24 claims that are baseless and allegations that are unfounded in the manner
25 Nugget so chooses. To date, the Ninth Circuit has confirmed the propriety of
Nugget's position in this matter, when it found Spencer to be a supplier, a
fact that Metco conveniently ignores. Nugget's unwillingness to subject
itself to further burden and expense under such circumstances is
unequivocally within its legal right, and is not an act of bad faith.

1 unjustly enriched in view of the undisputed fact that Nugget sustained
2 losses in excess of \$1.5 million resulting from Nugget's contract with
3 Spencer Rock?

4 Even a cursory review of Metco's state law claims in full view of
5 the undisputed facts establish that these claims are both factually
6 and legally baseless. To be sure, Metco's laundry list of state law
7 claims reflects its mulish insistence that Nugget should pay Metco the
8 money that Spencer Rock did not for Metco's work on the Project (as
9 well as over 27 times that amount in punitive damages) because the
10 Homer Spit Project was a federally-bonded job. Metco remains
11 unwilling to accept the Ninth Circuit's September 21, 2001 decision
12 that firmly established that Metco's position was flatly wrong. Metco
13 remains equally oblivious to the notion that its insistence in this
14 regard does not render its position any more credible, or any less
15 erroneous over time. The alleged factual and legal substance behind
16 Metco's state law claims are belied by their conspicuous absence at
17 the outset of this litigation, as well as the undisputed facts to the
18 contrary that are discussed herein. Accordingly, in the absence of
19 any genuine issue of material fact, Nugget is entitled to summary
20 judgment as a matter of law.

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I. STATEMENT OF FACTS⁴A. THE CONTRACT BETWEEN NUGGET AND SPENCER ROCK

1. On or about September 28, 1996, the U.S. Corps of Engineers ("USCOE") awarded Nugget Contract DACW85-96-C-0020 to repair and extend the Homer Spit in Seward, Alaska (the "Project"). See Contract No. DACW85-96-C-0020, Lynn D. "Randy" Randolph Affidavit ("Randolph Aff."), April 20, 2006, Ex. 1, ¶ 2. USF&G provided a payment bond on the Project. See Payment Bond 99-0120-50298-96-5, Randolph Aff., Ex. 2, ¶ 2.

2. On January 15, 1997, Nugget entered into a Material Contract with Spencer Rock for the supply and transport of armor, toe and filter stone rock from the Spencer Quarry, located in Seward, Alaska, to a barge docked in Seward. See Material Contract, December 18, 1996, Randolph Aff., Ex. 3 ¶ 3.

3. Between the Spencer Quarry and the Seward dock, the rock traveled in four distinct segments. First, after blasting, rocks were gathered and loaded into trucks at the Spencer Quarry. These trucks transported the rock from the Spencer Quarry to the Alaska Railroad Corporation ("ARRC") station, where the rock was loaded into ARRC rail cars. This work was performed by Spencer Rock (which was later assisted by Nugget). Second, the rock traveled by ARRC rail car to Seward, where it was unloaded from the rail cars onto a "siding" at

⁴ The facts set forth herein are supported by the accompanying Affidavits of Lynn "Randy" Randolph, Nugget's Project Manager for this contract, and Thomas R. Krider.

1 the ARRC rail yard in Seward. Third, the rock was transported by
2 truck from the siding at the ARRC rail yard in Seward to the Seward
3 dock. This is the segment in which Metco performed its work. Fourth,
4 and finally, the rock was loaded by North Star into "skip boxes" and
5 from the boxes at the Seward dock onto barges, which carried the rock
6 to the Homer Spit. See Randolph Aff., ¶ 3.

7 B. THE SUPPORT AGREEMENT BETWEEN NUGGET AND SPENCER ROCK

8 4. Spencer Rock commenced performance on or about January 15,
9 1997. In April 1997, Nugget became concerned that Spencer Rock was
10 not producing enough quantities of conforming rock for the Project.
11 First, Nugget visited the Spencer Quarry and found large stockpiles of
12 nonconforming rock. Second, Spencer Rock's major pieces of equipment
13 for operating the Spencer Quarry had been repossessed by Spencer
14 Rock's bank. In light of these developments, in early April 1997,
15 Spencer Rock approached Nugget for assistance in carrying out Spencer
16 Rock's duties under the Material Contract. Spencer Rock and Nugget
17 subsequently executed a Support Agreement on April 23, 1997. See
18 Support Agreement, April 23, 1997, Randolph Aff., Ex. 4, ¶ 4. Per
19 this agreement, the parties agreed that, in exchange for Nugget's
20 support of Spencer Rock's work under the Material Contract, Nugget
21 would recover from Spencer Rock, or "backcharge," the amounts owed to
22 Nugget by Spencer Rock per the Material Contract. *Id.*

23 5. Nugget's support efforts to Spencer Rock were provided
24 exclusively to Spencer Rock. Nugget never offered or provided its

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1 support services to Metco, Shoreside or North Star. See Randolph
2 Aff., ¶ 6.

3 6. During the third segment of work (transport of rock from
4 the railcar to the dockside), Nugget never provided support services,
5 in the way of manpower, equipment, trucks, loaders, direction or
6 otherwise, to Metco. Further, Nugget's support services never
7 extended to the fourth segment, which involved the loading of rocks
8 from the skip boxes onto the barges. Although Nugget personnel were
9 present to facilitate loading of rock from the skip boxes to the
10 barges, this would have occurred in the normal course even if the
11 Support Agreement had never been executed. Metco never sought
12 Nugget's guidance, direction or assistance during the course of
13 Metco's performance. See *id.*, ¶ 7.

14 7. The total amount of rock that Spencer Rock was
15 contractually obligated to transport, and that was in fact transported
16 with Nugget's assistance, from the Spencer Quarry to the Nugget barges
17 in Seward was equal to ten barge loads. See *id.*, ¶ 8.

18 8. From May 8 through August 8, 1997, Nugget paid Spencer Rock
19 \$197,184.66 for work performed under the Material Contract. See *id.*,
20 ¶ 9.

21 9. Based on the total quantity of rock delivered for the
22 project at the rates and terms set forth in the Material Contract, the
23 total value of rock produced by Spencer Rock was \$1,623,892.50.
24 Nugget's costs associated with rendering assistance to Spencer Rock

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1 pursuant to the Support Agreement were \$1,878,138. In addition, as a
2 direct result of Spencer Rock's failure to provide rock that conformed
3 to the Material Contract, Nugget incurred additional expenses in
4 excess of \$1,213,380. Thus, the total amount of costs and expenses
5 that Nugget incurred resulting from its dealings with Spencer Rock
6 exceeded the amount that Nugget agreed to pay Spencer Rock under the
7 Material Contract by \$1,664,811. See *id.*, ¶ 10.

8 C. THE CONTRACT BETWEEN SPENCER ROCK AND METCO

9 10. In early May, 1997 Robert A. LaPore, co-owner of Spencer
10 Rock, entered into a verbal contract with Frank Dieckgraeff, President
11 of Metco, to transport rock from the ARRC siding to the skip boxes at
12 the Seward dock. See Krider Aff., Ex. 1, Deposition of Barbara
13 Dieckgraeff, November 29, 2005 ("Dieckgraeff Dep."), p. 9, lines 19-
14 25, p. 10, lines 1-9.

15 11. Metco provided services under its contract with Spencer
16 Rock between May 3, 1997 and June 26, 1997. See *id.*, p. 10, lines 9-
17 10, p. 30, lines 12-30. Because Metco's offices were situated
18 directly across from the railroad such that it could observe when rock
19 was deposited onto the siding, Metco was "always aware" of when rock
20 was ready for transport to the boxes at the Seward dock. Metco was
21 also instructed by Mr. LaPore or a Spencer Rock employee when rock was
22 ready for transport from the siding to the Seward dock. See *id.*, p.
23 14, lines 9-14.

1 12. Several days after Metco commenced performance, LaPore
2 requested that Metco provide oil, lubrication and maintenance services
3 on Spencer Rock trucks and loaders that had transported rock from the
4 siding to the Seward dock prior to Metco's engagement, and that
5 continued to transport rock from the siding to the Seward dock during
6 the same period that Metco was also transporting rock. See *id.*, p.
7 13, lines 13-25. Metco agreed, wanting to "offer Bob [LaPore] as much
8 support as possible," because Metco "knew he had a deadline to meet."
9 *Id.*, p. 14, lines 1-2. Also at the request of Mr. LaPore or Spencer
10 Rock employees, Metco agreed to provide truck drivers and loader
11 operators to operate Spencer Rock trucks and loaders when Spencer Rock
12 was unable to staff its trucks and loaders with Spencer Rock
13 employees. See *id.*, p. 14, lines 20-25, p. 15, lines 1-6. This was
14 provided on a time and materials basis.

15 D. THE ABSENCE OF INTERACTION BETWEEN NUGGET AND METCO

16 13. No representative of Nugget was present during the
17 conversation or conversations in which Spencer Rock formed its verbal
18 contract with Metco. See *id.*, p. 11, lines 18-20, p. 13, lines 3-6.
19 Nugget never made any oral or written promise to be contractually
20 bound to Metco. Moreover, Nugget never exhibited any conduct to
21 manifest the intent to be contractually bound to Metco. See Randolph
22 Aff., ¶ 12.

23 14. It has always been Metco's understanding that Metco entered
24 into a contract with Spencer Rock, and not Nugget. Further, it has

1 always been Metco's understanding that the services it provided under
2 its contract with Spencer Rock were to Spencer Rock, and not Nugget.
3 See Krider Aff., Ex. 1, Dieckgraeff Dep., p.10, lines 13-19, p.12,
4 lines 20-25, p. 13, lines 1-3, p. 32, lines 5-13.

5 15. During the course of Metco's performance, Frank Dieckgraeff
6 had a conversation with L.D. "Randy" Randolph, then Project Manager
7 for Nugget, most likely at the Seward dock, during which Randolph
8 expressed his desire that Metco support Spencer Rock during the course
9 of performance on the project. See *id.*, p. 11, lines 20-25, p. 12,
10 lines 1-15. With the exception of this one conversation, there were
11 no other communications, verbal, written, express, implied or
12 otherwise, between any representative of Nugget and any representative
13 of Metco during the course of Metco's performance on the Project. See
14 Randolph Aff., ¶ 11.

15 16. Neither Mr. Randolph nor any Nugget representative ever
16 indicated to Metco that Nugget would cover Spencer Rock's outstanding
17 debts to Metco. Further, there was never any express agreement
18 between Nugget and Mr. LaPore that Mr. LaPore or Spencer Rock would
19 act as Nugget's agent in the prosecution of Spencer Rock's work under
20 the Material Contract. Moreover, there was never a manifestation on
21 the part of Nugget that Spencer Rock may act on Nugget's account. See
22 *id.*, ¶¶ 13, 14.

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1 17. Nugget's payments for work under the Material Contract,
 2 which included the work that Metco performed for Spencer Rock, were
 3 made exclusively to Spencer Rock and never to Metco. See *id.*, ¶ 14.

4 E. CIRCUMSTANCES SURROUNDING SPENCER ROCK'S FAILURE TO PAY METCO

5 18. Generally, Metco prepared "invoices" at the end of each day
 6 that Metco provided services to Spencer Rock, and then forwarded these
 7 invoices the following day to Spencer Rock for payment. Krider Aff.
 8 Ex. 1, Dieckgraeff Dep., p. 20, lines 13-24. In addition, Metco also
 9 prepared and forwarded to Spencer Rock "statements," which
 10 consolidated days of work that appeared on the various invoices that
 11 were sent to Spencer Rock. *Id.*, p. 19, lines 16-25, p. 20 lines 1-12.

12 19. Spencer Rock's first payment to Metco for services
 13 performed by Metco under its verbal contract with Spencer Rock became
 14 due on June 15, 1997. See *id.*, p. 21, lines 15-17. On this same day,
 15 LaPore misinformed Metco representatives that Spencer Rock had not
 16 been paid by Nugget for services performed by Spencer Rock for work
 17 under the Material Contract, and that he would pay Metco "just as soon
 18 as he could." *Id.*, p. 26, line 21.⁵ During this discussion, Mr.
 19 LaPore also complained to Metco about overtime charged to Spencer Rock
 20 for Metco's work under its contract with Spencer Rock. See *id.*, p.
 21 27, line 7.

22 //

23
 24 ⁵ In fact, Nugget paid Mr. LaPore \$147,184.66 on May 8, 1997 for the first two
 25 barge loads of rock. See Randolph Aff., ¶ 8.

1 20. Following Metco's June 15, 1997 conversation with Mr.
2 LaPore, Metco became concerned for the first time that Spencer Rock
3 might not pay Metco for its work. See *id.*, p. 21, lines 15-17, p. 26,
4 line 15. Nevertheless, Metco continued to perform services for
5 Spencer Rock "[b]ecause it was a bonded job and [Metco was] sure
6 [LaPore] would get paid." *Id.*, p. 28, lines 17-18. Metco also
7 continued its performance during this period upon the belief that
8 Metco was "covered by [Nugget's bond]" and that, "because it was a
9 bonded job, [Metco] could get the payment from Nugget," in the event
10 that Spencer Rock did not pay Metco. *Id.*, p. 33, line 22, p. 28,
11 lines 20-21. Notably, Metco's continued performance was not based on
12 any statements or conduct of Nugget representatives.

13 21. Metco's last day of performance was on June 26, 1997. The
14 following day, Ms. Dieckgraeff contacted Mr. Randolph, during which
15 conversation Ms. Dieckgraeff discussed Spencer Rock's nonpayment to
16 Metco. Following this conversation, Ms. Dieckgraeff faxed to Mr.
17 Randolph the invoices for its work under Metco's contract with Spencer
18 Rock that were outstanding and overdue. See *id.*, p. 21, lines 4-8, p.
19 29, lines 15-23. At no time during the conversation between Ms.
20 Dieckgraeff and Mr. Randolph did Mr. Randolph indicate that Nugget
21 would pay Metco for the services Metco performed under its contract
22 with Spencer Rock. See *id.*, p. 31, lines 8-11. Further, prior to
23 June 27, 1997, Metco had neither spoken with, nor provided invoices or
24 statements to, any Nugget representative regarding Spencer Rock's

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1 nonpayment to Metco. See *id.*, p. 21, lines 9-17. Metco's last day of
2 performance under its contract with Spencer Rock was June 26, 1997.

3 22. On June 30, 1997, Metco credited Spencer Rock \$371.00 in
4 overtime charges for Metco's work under its contract with Spencer
5 Rock. See *id.*, p. 20, line 20; Krider Aff. Ex. 2, Metco's Discovery
6 Responses, Nov. 14, 2005, Metco, Inc. Statement dated 12/31/97. Metco
7 credited Spencer Rock this overtime because Metco believed that such
8 credit would ease Spencer Rock's ability to pay Metco. See Krider
9 Aff., Ex. 1, Dieckgraeff Dep., p. 18, lines 24-25.

10 23. By letter dated July 31, 1997, Metco provided notice to
11 Walter D. ("Doug") Wood, Administrative Contracting Officer, U.S.
12 Army, that: "Metco, Inc. was hired by Spencer Rock to help in Seward
13 with unloading and stacking the rock from the rail and hauling rock to
14 the barges. This work went through May and June amounting to
15 \$31,508.56. To date we have received no payment for this work."
16 Krider Aff., Ex. 1, Metco's Discovery Responses, Nov. 14, 2005, Letter
17 from Barbara Dieckgraeff to Doug Wood, July 31, 1997, p. 44 of 50.

18 24. Metco's December 31, 1997 statement to Spencer Rock
19 indicates that the total amount due Metco is \$33,068.27. This amount
20 includes the \$371.00 credit to Spencer Rock for overtime, as well as
21 six separate monthly "Finance Charges" totaling \$1559.71 for the
22 months of July 1997 through December 1997. See *id.* Metco, Inc.
23 Statement dated 12/31/97.

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1 25. Spencer Rock has still not paid Metco any amounts due
2 pursuant to the verbal agreement between Spencer Rock and Metco. On
3 May 8, 1997 Nugget paid Spencer Rock \$147,184.66 for the first two
4 barge loads of rock and, between May 8, 1997 and August 8, 1997,
5 Nugget paid Spencer Rock an additional \$50,000, totaling \$197,184.66.

6 II. LEGAL ARGUMENT

7 A. SUMMARY JUDGMENT STANDARD OF REVIEW

8 Rule 56(c) of the Federal Rules of Civil Procedure instructs that
9 a motion for summary judgment shall be "rendered forthwith if the
10 pleadings, depositions, answers to interrogatories, and admissions on
11 file, together with the affidavits, if any, show that there are no
12 genuine issue as to any material fact and that the moving party is
13 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
14 Federal summary judgment procedure requires the piercing through the
15 pleadings and their adroit craftsmanship to reach the substance of the
16 claim. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
17 475 U.S. 574, 587 (1986).

18 Where the record taken as a whole could not lead a rational
19 trier of fact to find for the non-moving party, then there is no
20 genuine issue for trial. *See id.* Accordingly, "an adverse party may
21 not rest upon the mere allegations or denials of his pleading, but his
22 response, by affidavits or as otherwise provided in this rule, must
23 set forth specific facts showing that there is a genuine issue for
24 trial." Fed. R. Civ. P. 56(e).

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1 B. BECAUSE THERE WAS NO CONTRACT BETWEEN NUGGET AND METCO, EXPRESS
2 OR IMPLIED-IN-FACT, METCO'S BREACH OF CONTRACT CLAIM MUST FAIL

3 Metco alleges that Nugget was aware or should have been aware
4 that Metco "entered into a written contract and/or oral agreement with
5 Spencer committing [Metco] to supply goods to or to perform services
6 for the Homer Project," and that "Nugget breached the contract and/or
7 agreement by repeatedly refusing to pay the undisputed legal
8 consideration for the goods and/or services." Metco's Amended
9 Complaint, ¶ 26.

10 It is established law of the case that Metco "never entered into
11 express contracts with Nugget." *North Star Terminal & Stevedore Co.*
12 *ex rel. v. Nugget Construction Inc., et al. v. Shoreside Petroleum*
13 *Inc. ex rel; Metco, Inc.*, Slip Op. No. 02-35887 at 4 (9th Cir., March
14 3, 2005). Thus, in the absence of an express contract, such contract
15 must be implied-in-fact if Nugget is to be held in breach.

16 Under Alaska law,⁶ an implied-in-fact contract requires all of
17 the elements of an express contract and, significantly, an intent to
18 be bound. See *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130,
19 1140 (Alaska 1996). An implied-in-fact contract "arises where the
20 court finds from the surrounding facts and circumstances that the

21 ⁶ It bears noting that the legal elements necessary to establish the existence
22 of a contract implied-in-fact under Alaska state law are distinct from the
23 elements necessary to establish federal Miller Act liability under a
24 "strawman" theory; significantly, even if Metco could substantiate its Miller
25 Act claims, which it cannot, this fact alone would not indicate the existence
of an implied-in-fact contract between Nugget and Metco without additional
evidence of a meeting of the minds. As discussed herein, Metco's implied-in-
fact contract claim must fail because there is no such evidence.

1 parties intended to make a contract but failed to articulate their
2 promises and the court merely implies what it feels the parties
3 intended." *Id.* at 1140. "[I]mplied-in-fact contracts are closely
4 related to express contracts" whereby "each requires the parties to
5 form an intent to enter into a contract." *Id.* at 1142; see also
6 *Altman v. Alaska Truss & Mfg.*, 677 P.2d 1215, 1226 (Alaska 1983) ("an
7 implied-in-fact contract only exists where there is mutual assent
8 between the parties").

9 The material and undisputed facts establish that there was never
10 any objective manifestation of an intent to be bound, either on the
11 part of Nugget or Metco. Nugget never made any oral or written
12 promise to be bound contractually to Metco. Moreover, Nugget never
13 exhibited any conduct to manifest the intent to be bound to Metco.
14 Nugget was not present at the contractual negotiations between Spencer
15 Rock and Mr. LaPore. But for a single conversation between Mr.
16 Randolph and Mr. Dieckgraeff, there was no interaction or
17 communication, direct or indirect, between Nugget and Metco during the
18 course of Metco's performance. Nugget never provided support
19 services, in the way of manpower, equipment, trucks, loaders,
20 direction or otherwise, to Spencer Rock or Metco for work in the third
21 segment, or during the transport of rock between the siding at the
22 Seward rail yard and the skip boxes at the Seward dock.

23 Equally clear, Metco never sought Nugget's guidance, direction or
24 assistance during the course of Metco's performance. All direction

1 that Metco received over the course of performance was provided by Mr.
2 LaPore or a representative of Spencer Rock. Metco assisted Spencer
3 Rock, not Nugget, by providing maintenance and operators for Spencer
4 Rock equipment. Further, during the course of Metco's performance,
5 Metco submitted its invoices to Spencer Rock, not Nugget, which is
6 consistent with the conversations that transpired during the course of
7 performance regarding Metco's payment between Metco and Spencer Rock,
8 and not between Metco and Nugget. Metco did not inform Nugget of
9 Spencer Rock's non-payment until June 27, 1997, when Ms. Dieckgraeff
10 faxed Mr. Randolph the invoices that Metco sent to Spencer Rock for
11 services through June 11, 1997. Before June 27, 1997, Metco did not
12 communicate with anyone from Nugget about Spencer Rock's nonpayment.
13 See Krider Aff., Ex. 1, Dieckgraeff deposition, p. 20, line 25; p. 21,
14 lines 1-17. By the time of this communication, Metco had concluded
15 its performance for Spencer Rock.

16 Further, during Metco's course of performance, neither Spencer
17 Rock nor Nugget expressly or impliedly obligated Nugget to pay for any
18 of Metco's services that were invoiced to Spencer Rock. See *id.*,
19 Dieckgraeff deposition, p. 31, lines 8-14, lines 22-25. Even after
20 Metco informed Nugget of Spencer Rock's non-payment, Nugget never
21 indicated to Metco that it would cover Spencer Rock's outstanding
22 debts to Metco.

23 These objective indicia are wholly consistent with Metco's
24 subjective understanding that it executed a contract with Spencer Rock

25
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1 and not Nugget. Significantly, these indicia are consistent with
2 Metco's belief that Nugget is liable to Metco, not because it entered
3 into a contract with Nugget but, because the Homer Spit Project was a
4 "federally-bonded job":

5 Q. Okay. During the time of performance, did anyone from
6 Spencer - from Spencer tell you that Nugget would pay
your bills?

7 A. No.

8 Q. But you were comfortable that you would ultimately be
paid because this was a bonded project?

9 A. Yes, we were. It was Nugget's barge and they were a
federally-bonded job.

10 Q. And during this period of time until you last provided
11 services on the 26th [of June 1997], you believed you
had a contract with Spencer?

12 A. Yes.

13 Q. And you had no contract negotiations with Nugget?

14 A. No, we didn't contract with Nugget. We contracted
with Spencer, but it was Nugget's barge and it was
ultimately going to be their rock.

15 *Id.*, Dieckgraeff dep., p. 31, lines 22-25, p. 32, lines 1-13; see also
16 *id.* p. 10, lines 14-15 (Q. . . . "[D]id you believe your contract was
17 with Spencer Rock? A. "We believed our contract was with Spencer
18 Rock, but we expected [LaPore] to get paid by Nugget and Nugget would
19 be responsible."); p.12, lines 20-23 ("Q. At the point your husband

20 ///

21 ///

22 ///

23 ///

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25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
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1 and Bob [LaPore] finished these discussions, did your husband or did
2 Metco believe it had a contract with Spencer? A. Yes.").⁷

3 A balanced and objective consideration of the facts and
4 circumstances surrounding Metco's negotiation and performance of its
5 contract with Spencer Rock establishes that there was never any
6 contract between Metco and Nugget, express or implied-in-fact.
7 Metco's empty and after-the-fact allegations to the contrary do not
8 affect this conclusion. Consequently, because there was no contract
9 between Metco and Nugget, Nugget is entitled to summary judgment as a
10 matter of law that Nugget never breached any alleged express or
11 implied-in-fact contract with Metco.

12 C. Because Nugget and Metco did not have any substantial interaction
13 during the course of Metco's performance, and because Nugget was
14 not required to disclose the Support Agreement, Metco's
promissory estoppel, detrimental reliance and misrepresentation
and nondisclosure claims must fail

15 Although identified as three separate causes of action, Metco
16 raises essentially the same allegations to support its promissory
17 estoppel, detrimental reliance, and misrepresentation and
18

19 ⁷ In her recent deposition, Ms. Dieckgraeff articulated what is, and what has
20 been since the inception of Metco's lawsuit, the essence of Metco's theory of
21 liability against Nugget: Because Metco provided labor and services to a
22 federally bonded project, Metco can seek payment from the bond surety, USF&G,
23 and Nugget as the prime contractor. See Krider Aff., Ex. 1, Dieckgraeff
24 dep., p. 28, lines 15-23, p. 34, lines 7-15. If Metco were entitled to any
25 recovery, which it is not, such recovery would be under the federal Miller
Act, and not under the Alaska state law contract, tort, or equitable theories
alleged in its Amended Complaint. However, because the Ninth Circuit found
Spencer Rock to be a supplier, which meant Metco's assumption about the
bond's coverage was in error, Metco has now attempted to create claims that
simply do not exist.

1 nondisclosure claims. In support of its promissory estoppel claim,
2 Metco alleges that, "[d]espite [Nugget's] statements that its
3 inducements were carefully presented to [Metco] to avoid any
4 obligations, the inducements and surrounding circumstances reasonably
5 caused [Metco] to provide goods or perform services." Metco's Amended
6 Complaint, ¶ 27. Similarly, in support of its detrimental reliance
7 theory, Metco asserts:

8 During the prosecution of the Homer Project, [Metco] was
9 aware that the Project was a government project of the Army
10 Corps of Engineers and that Nugget posted a bond to provide
11 payment for any unpaid goods or services. [Metco] placed
12 substantial reliance on this understanding as an inducement
13 for [Metco] to continue performing. [Metco] also was aware
14 that individuals who had worked for or were working for
15 Spencer also had worked for or were working with Nugget.
16 [Metco] detrimentally relied and did reasonably rely to its
17 detriment on these and other facts and circumstances to
18 furnish valuable goods or services in the prosecution of
19 the work on the Homer Project.

20 *Id.*, ¶ 30. Finally, Metco's detrimental reliance claim resembles
21 strongly its misrepresentation and nondisclosure claim: "By such
22 words, conduct and/or omissions, [Nugget] misled [Metco], the Federal
23 Government and other companies similarly situated to [Metco],
24 regarding the true relationships between Spencer and Nugget, the
25 security of the payment bond, and Nugget's dominance and control over
26 Spencer and LaPore and rechanneling payments to itself for its own
27 benefit." *Id.*, ¶ 33. The common thread running through each of these
28 causes of action is the assertion that Metco's performance was induced
29 upon reliance of some act or omission on the part of Nugget.

30 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
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1 i. Nugget never made an actual promise or affirmative act

2 Under Alaska law, there are four requirements for a promissory
3 estoppel claim: "(1) the action induced amounts to a substantial
4 change of position; (2) it was either actually foreseen or reasonably
5 foreseeable by the promisor; (3) an actual promise was made and
6 itself induced the action or forbearance in reliance thereon; and (4)
7 enforcement is necessary in the interest of justice." *Reeves v.*
8 *Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1142 (Alaska 1996).
9 Significantly, Alaska courts have long held that promissory estoppel
10 requires that "an actual promise was made." *Brady v. State*, 965 P.2d
11 1, 10 (Alaska 1998).

12 Similarly, detrimental reliance can only occur, legally speaking,
13 when the party seeking to invoke the doctrine of equitable estoppel
14 has relied reasonably on the representation of the adverse party. See
15 *State Dept. of Revenue v. Northern TV, Inc.*, 670 P.2d 367, 370 (Alaska
16 1983). A party claiming equitable estoppel must prove four elements:
17 "(1) assertion of a position by conduct or word; (2) reasonable
18 reliance thereon; (3) resulting prejudice; and (4) the estoppel will
19 be enforced only to the extent that justice so requires." *Ogar v.*
20 *City of Haines*, 51 P.3d 333, 335 (Alaska 2002).

21 Metco's promissory estoppel and detrimental reliance claims
22 suffer from numerous and considerable shortcomings; most significant,
23 Nugget never made an "actual promise" to Metco, much less an actual
24 promise that "itself induced the action or forbearance in reliance

25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
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thereon" on the part of Metco. *Reeves*, 56 P.3d at 670; see *Brady*, 965 P.2d at 10. Similarly, Nugget never affirmatively asserted "a position by conduct or word." *Ogar*, 51 P.3d at 335. But for one insignificant conversation, there was literally no interaction of significance between Metco and Nugget either before or during the course of Metco's performance. Metco therefore cannot claim to have been induced to rely upon any affirmative act or statement regarding either (i) Metco's decision to enter into its agreement with Spencer Rock, or (ii) Metco's continued performance under its contract with Spencer Rock. For this reason alone, Metco's promissory estoppel and detrimental reliance claims must fail.

ii. There is no duty to disclose the Support Agreement

In the absence of any affirmative act, the only conceivable fact on which Metco could rely in support of its remaining misrepresentation and nondisclosure claims⁸ is that it detrimentally

⁸ In addition to fraudulent and negligent misrepresentation, Metco also makes a claim for "innocent" misrepresentation. Innocent representation occurs when "one who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently." *Bevins v. Ballard*, 655 P.2d 757, 762 (Alaska 1982) (citing section 552C(1) of the Restatement (Second) of Torts (1977)). In addition to the reasons discussed herein why Metco's misrepresentation claim must fail, because there is no "sale rental or exchange transaction," Metco's innocent representation claim is inapposite. See also *Smith v. Tyonek Timber, Inc.*, 680 P.2d 1148, 1153-54 (Alaska 1984) (relying on *Moorman Manufacturing Co. v. National Tank Co.*, 435 N.E. 2d 443 (Ill. 1982), which held that a food processor could not recover against a manufacturer of a defective grain storage tank for economic loss under the tort theories of strict liability, or negligence or innocent misrepresentation).

1 relied upon, and was induced to act by, Nugget's nondisclosure of its
2 Support Agreement with Spencer Rock. These remaining theories of
3 recovery thus turn on one single and dispositive question of law: Was
4 Nugget legally required to disclose its Support Agreement with Spencer
5 Rock to Metco?

6 If the answer is yes, then there is a genuine issue of
7 material fact regarding the nature of the relationship between Nugget
8 and Spencer Rock and whether Metco would have relied upon the
9 information in the Support Agreement in connection with the
10 prosecution of its work under its contract with Spencer Rock. If the
11 answer is no, then it does not matter whether Metco would have changed
12 its position with the knowledge of information in the Support
13 Agreement because Metco was not entitled to such information in the
14 first instance.

15 Negligent misrepresentation arises when: (1) a party
16 accused of misrepresentation made a statement in the course of his
17 business, profession, or employment, or in any other transaction in
18 which he has pecuniary interest, (2) the representation supplied false
19 information, (3) there was justifiable reliance on the false
20 information and (4) the accused party failed to exercise reasonable
21 care or competence in obtaining or communicating information. See
22 *Reeves v. Alyeska Pipeline Serv. Co.*, 56 P.3d 660, 670-671 (Alaska
23 2002). Further, "[n]ot every casual response, not every idle word,

24
25

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1 gives rise to a cause of action," and, significantly, liability arises
2 only where there is a duty, if one speaks at all, to give correct
3 information. *Howarth v. Pfeifer*, 443 P.2d 39, 42 (Alaska 1968)
4 (citing *International Prods. Co. v. Erie R.R.*, 155 N.E. 662, 663,
5 *cert. denied*, 275 U.S. 527 (1927)).

6 Significantly, "[t]o prevail in an action for fraudulent or
7 negligent misrepresentation the plaintiff must prove the existence of
8 either an affirmative misrepresentation or an omission where there is
9 a duty to disclose." *Hagans, Brown & Gibbs v. First Nat. Bank of*
10 *Anchorage*, 810 P.2d 1015, 1019 (Alaska 1991). The duty to disclose
11 arises when facts are concealed or unlikely to be discovered because
12 of the special relationship between the parties, the course of their
13 dealings, or the nature of the fact itself. See *Matthews v. Kincaid*,
14 746 P.2d 470, 471-472 (Alaska 1987). Nondisclosure similarly requires
15 a failure to disclose information when there is an affirmative duty to
16 do so. *Turnbull v. LaRose*, 702 P.2d 1331, 1334 (Alaska 1985) (citing
17 factors for disclosure of information for parties in a business
18 transaction as set forth in Restatement (Second) of Torts, § 551
19 (1977)).

20 As a threshold matter, Metco fails to recognize that the Support
21 Agreement is a legal and binding agreement between Nugget and Spencer
22 Rock. There is no rule or maxim, no statute or regulation, no
23 principle or guideline, under either Alaska state law or federal law,
24 that would preclude Spencer Rock from accepting Nugget's assistance in

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1 completing Spencer Rock's work under its contract with Nugget and, in
2 full fair consideration therefor, allowing Nugget to backcharge
3 Spencer Rock for the time, labor and materials associated with that
4 assistance. Indeed, even if Nugget and Spencer Rock had not entered
5 into the Support Agreement, Nugget would be well within its legal
6 right to withhold from Spencer Rock payments for work within the scope
7 of the Material Contract that Nugget had to perform itself:

8 A general contractor may be justified in refusing to make a
9 progress payment to the subcontractor when the latter has
10 failed to substantially perform his contractual obligations
11 entitling him to the payment. See 3A Corbin on Contracts
12 § 708 (1960); see also *id.* § 692 at 273; Restatement
13 (Second) of Contracts § 237, comment d (1981). It follows
14 that the general contractor is entitled to withhold from a
15 progress payment a valid backcharge for work within the
16 scope of the subcontract which the general contractor has
17 had to perform itself.

18 *Howard S. Lease Constr. Co. & Assoc. v. Holly*, 725 P.2d 712, 715-716
19 (Alaska 1986). Metco may have raised a host of inapposite legal
20 theories and baseless factual allegations in its amended complaint,
21 but Metco has never alleged that the Support Agreement was illegal or
22 otherwise void, nor can it as a matter of law.

23 Second, Metco has not identified any statutory or common
24 law duty under Alaska state or federal law that contracts such as the
25 Support Agreement must be disclosed or published for public review.
As Nugget has stated time and again, it entered into the Support
Agreement with Spencer Rock to ensure that its performance on its
contract with the Federal Government would not suffer from anticipated
difficulties in Spencer Rock's performance of its contract with

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1 Nugget. There was no other purpose. Regardless, even if Metco
 2 disputes this fact, whether Metco may have altered its course of
 3 performance of its contract with Spencer Rock, if it had knowledge of
 4 the Support Agreement, is a moot point. Nugget was not bound by law
 5 or by duty to disclose the Support Agreement to anyone;⁹ therefore,
 6 Metco may not assert that it detrimentally relied upon Nugget's
 7 nondisclosure of the Support Agreement, under any theory.
 8 Consequently, in the absence of any genuine issue of material fact,
 9 Nugget is entitled to summary judgment as a matter of law on Metco's
 10 promissory estoppel, detrimental reliance, and misrepresentation and
 11 nondisclosure claims.¹⁰

12 D. Nugget never owed Metco any duty of care, thus, Metco's
 13 negligence claims must fail

14 Metco's negligence claim appears pulled out of thin air: "Under
 15 the circumstances, [Nugget] owed [Metco] . . . a duty of care,

16
 17 ⁹ Indeed, if Nugget had disclosed to Spencer Rock's material suppliers the
 18 substance of the Support Agreement prior to date Spencer Rock executed its
 19 contract with Metco, Nugget may well have exposed itself to suit by Spencer
 20 Rock on a theory of tortious interference with contract or economic
 21 relations. Please see Section II.D, *infra*, for a further explanation of why
 22 Nugget did not owe Metco any duty that would have compelled the disclosure of
 23 the Support Agreement.

24 ¹⁰ In addition to the foregoing, it does not matter that Metco was aware "that
 25 the Project was a government project of the Army Corps of Engineers and that
 Nugget posted a bond to provide payment for any unpaid goods or services," or
 that "[Metco] placed substantial reliance on this understanding as an
 inducement for [Metco] to continue performing." Metco's Amended Complaint, ¶
 30. Despite its insistence to the contrary, the Ninth Circuit previously
 established that Metco, a second-tier vendor, was in error in its
 understanding and may not recover against Nugget simply because the Homer
 Spit Project was a "bonded job." Thus, Metco's awareness of Nugget's posting
 of the bond does nothing to support Metco's claims.

1 including a statutory duty. Nugget breached the duty which breach
2 legally caused harm and damages to [Metco]. Metco is entitled to
3 recover such damages, plus interest and attorney's fees, from
4 [Nugget]." Metco's Amended Complaint, ¶ 34. Metco does not identify
5 the nature of the supposed duty of care that was allegedly breached by
6 Nugget or any statute that might support such a theory.

7 Under Alaska law, "[t]he initial step in deciding whether an
8 action for negligence can be maintained is to consider whether a duty
9 exists." *Mesiar v. Heckman*, 964 P.2d 445, 448 (Alaska 1998).
10 "Whether an actionable duty exists is a question of law and public
11 policy." *Id.* "'Duty' is not sacrosanct in itself, but is only an
12 expression of the sum total of those considerations of policy which
13 lead the law to say that the particular plaintiff is entitled to
14 protection." *Id.* (quoting *City of Kotzebue v. McLean*, 702 P.2d 1309,
15 1313 (Alaska 1985) and William L. Prosser, *The Law of Torts* § 53, at
16 325 (4th ed. 1971)). Alaska courts will "first define the class of
17 cases to which [its] rulings apply, then weigh the factors which
18 support and oppose the imposition of liability in that class of
19 cases." *Id.* "In the first phase of duty analysis . . . duty is at
20 heart a question of policy centering on the basic relationship between
21 the parties rather than the nature of their conduct on a given
22 occasion. Particular conduct becomes important only when a duty is
23 imposed; the conduct then helps to determine the applicable standard
24 of care." *Id.* (citing W. Page Keeton et al., *Prosser and Keeton on*

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1 *the Law of Torts* § 53, at 356 (5th ed. 1984)). Notably, in
2 circumstances in which a negligence claim is predicated upon an
3 inaction or omission, there must be "some definite relation between
4 the parties, of such a character that social policy justifies the
5 imposition of a duty to act," or "a special relationship creating that
6 duty," for negligence liability to attach. *Ballum v. Weinrick's,*
7 *Inc.*, 633 P.2d 272, 273, 276 (Alaska 1981) (citing W. Prosser, *The Law*
8 *of Torts*, § 56 at 339 (4th ed. 1971)).

9 If the court can identify a class of cases to which its ruling
10 would apply, only then need it turn to the second phase of its
11 analysis, which involves a weighing of the factors that support and
12 oppose the imposition of liability:

13 [1] The foreseeability of harm to the plaintiff, [2] the
14 degree of certainty that the plaintiff suffered injury, [3]
15 the closeness of the connection between the defendant's
16 conduct and the injury suffered, [4] the moral blame
17 attached to the defendant's conduct, [5] the policy of
18 preventing future harm, [6] the extent of the burden to the
19 defendant and consequences to the community of imposing a
20 duty to exercise care with resulting liability for breach,
21 and [7] the availability, cost and prevalence of insurance
22 for the risk involved.

23 *Kooly v. State*, 958 P.2d 1106, 1108 (Alaska 1998); see also *D.S.W. v.*
24 *Fairbanks North Star Borough School District*, 628 P.2d 554, 555
25 (Alaska 1981).

 Here, the relationship between Nugget and Metco is one of prime
contractor and second-tier vendor that witnessed no substantial
interaction during the course of performance. The only connection
between Nugget and Metco is that both parties worked on the Homer Spit
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1 Project, a fact that was not brought about by Nugget, and that was
2 entirely dependent upon Mr. LaPore's decision to approach Metco for
3 assistance on the project and Metco's decision to accept Mr. LaPore's
4 invitation. Further, there is no privity of contract between Nugget
5 and Metco.

6 This is not the sort of relationship, much less a special
7 relationship, that can define a class of cases to which a court could
8 apply a ruling or, specifically, impose a duty under a negligence
9 theory. Such relationships (to the extent that the word
10 "relationship" applies to the limited interaction between Nugget and
11 Metco) are not bound by any duty under statute or common law, or as a
12 matter of public policy, that gives rise to a cause of action in
13 negligence. Metco has never identified any such duty. In fact, the
14 Alaska Supreme Court has specifically held that a lack of privity will
15 preclude recovery for pure economic loss upon a negligence theory,
16 which follows the longstanding and majority rule in most
17 jurisdictions. See *Smith v. Tyonek Timber, Inc., H&S Constr., Inc.*,
18 680 P.2d 1148, 1153-1154 (Alaska 1984); see also *Moorman Manufacturing*
19 *Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982) (cited in
20 *Smith*).¹¹ The Court should not indulge Metco's request to impose upon

21
22 ¹¹ *Smith* involved a claim by a subcontractor, Smith, against a concrete
23 supplier, Tyonek, that was selected by the prime contractor, H&S. The court
24 held, *inter alia*, that "Smith's lack of privity with Tyonek precludes his
25 recovery for pure economic loss based on a negligence theory." *Smith*, 680
P.2d at 1154. The same reasoning applies here: Because Metco is not in
privity with Nugget, Metco should be precluded from recovering from Nugget
for pure economic loss based upon a theory of negligence.

1 the attenuated relationship between a prime contractor and second-tier
2 vendor not in privity with one another a duty that has never before
3 been applied under Alaska (or any) law. *Cf. State v. Osborne*, 607
4 P.2d 369, 371 (Alaska 1980) (holding that homeowner did not owe any
5 duty to carpenter hired by homeowner's builder when builder failed to
6 compensate carpenter for work on homeowner's project).

7 Even if there were privity between Nugget and Metco, recovery of
8 purely economic losses on a theory of negligence would require a
9 showing that "the defendants knew or reasonably should have foreseen
10 both that particular plaintiffs or an identifiable class of plaintiffs
11 were at risk and that ascertainable economic damages would ensue from
12 the conduct." *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 360
13 (Alaska 1987). Here, there is an utter absence of "conduct"
14 attributable to Nugget that could support the imposition of a duty;
15 Metco may complain that the circumstances surrounding the Support
16 Agreement constitute actionable conduct but, as the Alaska courts have
17 expressly recognized, there is nothing improper about providing
18 support to contractor and then backcharging that contractor for the
19 value of the support. *See Howard S. Lease Constr. Co. & Assoc. v.*
20 *Holly*, 725 P.2d 712, 715-716 (Alaska 1986). Moreover, there is
21 absolutely no way that Nugget could have foreseen that Mr. LaPore
22 would fail to pay Spencer Rock's suppliers, including Metco.

23 It is for these same reasons that the "tortuous walk" through the
24 often-cited factors set forth in *Kooly* would be an exercise in

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1 futility, assuming a court determined that the relationship between a
2 Nugget and Metco was sufficiently ascertainable as to apply a ruling.
3 See *Smith*, 680 P.2d at 1153 (describing attempt to apply factors
4 similar to those set forth in *Kooly* in case in which parties lacked
5 privity as "futile"); *Kooly*, 958 P.2d at 1109-1111; *Mattingly*, 743
6 P.2d at 360 (emphasizing "the role of foreseeability as it relates to
7 duty owed and to proximate cause" in adopting rule permitting recovery
8 for purely economic losses). To be sure, attempting to analyze the
9 [1] foreseeability and [2] certainty of Metco's losses would have
10 required an understanding of the motivations underlying Mr. LaPore's
11 decision to breach his agreement with Metco. In the same vein,
12 analyzing: [3] the closeness of the connection between Nugget's
13 conduct and Metco's injury when there was neither a closeness nor a
14 connection; [4] the moral blame attached to Nugget's conduct, when
15 there was no conduct on which to assess moral blame; [5] the policy of
16 preventing future harm when the future harm cannot be readily
17 ascertained; [6] the burden to Nugget and the consequences to the
18 Alaska contracting community by imposing a duty never before known in
19 the history of contract or tort law, or; [7] the availability, cost
20 and prevalence of insurance for the risk involved when there has never
21 been in fact, and likely never been contemplated, a need for such
22 insurance, would be a futile exercise indeed. See *Kooly*, 958 P.2d at
23 1108

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1 In light of the foregoing, Metco's bald assertion that Nugget
2 owed Metco a duty of care is not enough to make it so. Moreover,
3 Metco has also failed to cite any federal or state law that imposes a
4 statutory duty between a prime contractor and a second-tier vendor of
5 a supplier to one another. In fact, as the Ninth Circuit held in its
6 first decision, the statutory law is to the contrary. In the absence
7 of any genuine issue of material fact, Nugget is entitled to summary
8 judgment dismissal of Metco's negligence claims as a matter of law.

9 E. Metco is not entitled to any remedy under unjust enrichment and
10 restitution, quantum meruit, equitable subordination or
11 constructive trust because Nugget has not improperly intercepted
12 funds due Metco or otherwise been unjustly enriched

13 Metco also alleges a number of equitable causes of action,
14 including unjust enrichment and restitution, quantum meruit, equitable
15 subordination and constructive trust. At the center of these claims
16 is the allegation that, through the Support Agreement, Nugget
17 improperly exercised its influence over Spencer Rock to intercept and
18 unjustly retain funds that are due Metco.

19 The concepts of quasi-contract, unjust enrichment, contract
20 implied-in-law, and quantum meruit are very similar and interrelated;
21 courts generally treat actions brought upon these theories as
22 essentially the same. See *Alaska Sales and Serv., Inc. v. Millet*, 735
23 P.2d 743, 746, fn. 6 (Alaska 1987). The three elements for a quasi-
24 contract or quantum-meruit claim are as follows: 1) a benefit was
25 conferred upon the defendant by the plaintiff; 2) an appreciation by
the defendant of such benefit; and 3) acceptance and retention by the

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1 defendant of such benefit under such circumstances that it would be
2 inequitable for him to retain it without paying the value thereof.
3 *See Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1143 (Alaska
4 1996). The courts are in accord in stressing that the most
5 significant requirement for recovery in quasi-contract is that the
6 enrichment to the defendant must be unjust; that is, the defendant
7 must receive a true windfall or "something for nothing." *Alaska Sales*
8 *and Serv., Inc.*, 735 P.2d at 746.

9 A constructive trust will be ordered to "compel one who unfairly
10 holds a property interest to convey that interest to another to whom
11 it justly belongs. When a court finds that a defendant is the holder
12 of a property interest which he retains by reason of unjust,
13 unconscionable, or unlawful means, it takes such interest from the
14 defendant and vests it in the wronged party. *See McKnight v. Rice,*
15 *Hoppner Brown & Brunner*, 678 P.2d 1330, 1335 (Alaska 1984).
16 Similarly, outside of the standard bankruptcy context in which it is
17 typically applied, the doctrine of equitable subordination will apply
18 in order to "undo or offset any inequity in the claim position of a
19 creditor that would produce injustice or unfairness to other
20 creditors." *Nerox Power Systems, Inc. v. M-B Contracting Co., Inc.*,
21 54 P.3d 791, 795 (Alaska 2002) (citations omitted).

22 Here, the undisputed facts establish that Nugget paid Spencer
23 Rock \$197,184.66 and that Nugget sustained losses in excess of \$1.5
24 million in connection with its dealings with Spencer Rock. This is

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1 not a situation in which Nugget received a windfall or retained
2 something for nothing, or, specifically, improperly retained money
3 that was due Spencer Rock, which in turn precluded Spencer Rock from
4 discharging its obligation to Metco. Quite to the contrary, Nugget
5 fully and fairly compensated Spencer Rock per the Material Contract as
6 modified by the Support Agreement and, for reasons that are not yet
7 clear, Spencer Rock then blatantly lied to Metco by withholding
8 Metco's payment on the basis that Spencer Rock was never paid by
9 Nugget. There is no principle in equity that would permit Metco to
10 recover money paid by the United States to Nugget that was rightfully
11 earned on the ground that Spencer Rock breached its contract with
12 Metco. If anyone has been unjustly enriched, it is Mr. LaPore and
13 Spencer Rock, whose conduct resulted in the nonpayment of Spencer
14 Rock's suppliers, as well a breach of its contract with Nugget that
15 resulted in Nugget's loss of over \$1.5 million dollars.

16 Further, it is well-established under Alaska law that a party to
17 an express contract may not seek recovery on extra-contractual
18 theories such as quantum meruit or implied contract. *See Mitford v.*
19 *de Lasala*, 666 P.2d 1000, 1006 n.1 (Alaska 1983); *Fairbanks North Star*
20 *Borough v. Kandik Const., Inc. & Assoc.*, 795 P.2d 793, 799 (Alaska
21 1990), *opinion vacated in part on rehearing on other grounds*, 823 P.2d
22 632 (Alaska 1991). Nevertheless, Metco unabashedly seeks to avoid or
23 ignore this rule by attempting to recover from Nugget the very same
24 quantum that is covered by Metco's contract with Spencer Rock.

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1 The conclusion that Metco cannot recover under its equitable
2 theories remains true even if Metco should attempt to create a genuine
3 issue of material fact regarding Nugget's intentions behind the
4 execution of the Support Agreement. Regardless of the intent that
5 Metco ascribes to Nugget, the fact would remain that Nugget has not
6 been unjustly enriched, and that Spencer Rock was compensated by
7 Nugget per the Material Contract, as modified by the Support
8 Agreement. To the extent that Metco would contend that Nugget
9 received value for Metco's delivery of rock across the third segment,
10 such value was wholly eliminated by Spencer Rock's failure to perform
11 and breach of its contract with Nugget and, consequently, the losses
12 that Nugget sustained therefrom. Accordingly, because there is no
13 genuine issue of material fact Nugget is entitled to summary judgment
14 on Metco's equitable claims.

15 F. Nugget and Spencer Rock are distinct entities and Spencer Rock
16 was never vested with any authority to act as Nugget's agent

17 In support of its agency claim, Metco alleges:

18 Nugget through its actions and inactions took over complete
19 control over the Homer Project and in effect directed all
20 the activities of Spencer and LaPore. Nugget exercised
21 complete control and dominion with respect to Spencer and
22 LaPore's operations and affairs. Nugget through the
23 support arrangement and other actions indebted Spencer and
24 LaPore to Nugget in an amount that overwhelmed and
25 undermined Spencer and LaPore. Nugget intercepted and
rechanneled funds to itself otherwise owed Spencer and
LaPore and became Spencer's and LaPore's principal, whether
disclosed or undisclosed to [Metco]. Nugget thus became
liable to [Metco] for the acts of its agents, Spencer and
LaPore, especially those of which Nugget took advantage
such as Spencer's and LaPore's arrangements with [Metco]
for the provision of goods and services in connection with

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1 the Homer Project. The contractual arrangements and
2 obligations of the agents Spencer and LaPore became the
3 arrangements and obligations of the principal Nugget for
4 which Nugget is legally responsible.

5 Metco's Amended Complaint, ¶ 29. Not only do these factual
6 allegations fail to support a claim of agency between Nugget and
7 Spencer Rock on their face; these allegations also evidence Metco's
8 fundamental misunderstanding of the governing law regarding the
9 relationship between a principal and its agent.

10 "Under Alaska law, an agency relation exists only if there has
11 been a manifestation of the principal to the agent that the agent may
12 act on his account and consent by the agent so to act." *Harris v.*
13 *Keys*, 948 P.2d 460, 464 (Alaska 1997) (citations omitted) (relying
14 upon, *inter alia*, Restatement (Second) of Agency § 15).
15 Significantly, "the Restatement's requirement that an agent act 'on
16 the principal's account' should be interpreted as requiring action
17 under the principal's control, rather than merely action which serves
18 the principal's purposes." *Id.* at 465.

19 Further, "in order for an agency relationship to exist, the agent
20 must have 'a power to alter the legal relations between the principal
21 and third persons.'" *Manes v. Coats*, 941 P.2d 120, 123-24 (Alaska
22 1997) (quoting Restatement (Second) of Agency § 12). "The principal,
23 in turn, must have 'the right to control the conduct of the agent with
24 respect to matters entrusted to him.'" *Id.* at 124 (quoting
25 Restatement (Second) of Agency § 14). "If an agency relationship does
exist, the 'extent of the duties of the agent to the principal are

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1 determined by the terms of the agreement between the parties,
2 interpreted in light of the circumstances under which it is made.'" *Id.* at 124 (quoting Restatement (Second) of Agency § 376).

3
4 The existence of an agency relationship may be proved by
5 circumstantial evidence that shows a course of dealing between two
6 parties; however, "when an agency relationship is to be proven by
7 circumstantial evidence, the principal must be shown to have consented
8 to the agency since one cannot be the agent of another except by
9 consent of the latter." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309
10 N.W.2d 285, 290 (Minn. 1981). As between an agent and a supplier,
11 "[o]ne who contracts to acquire property from a third person and
12 convey it to another is the agent of the other only if it is agreed
13 that he is to act primarily for the benefit of the other and not for
14 himself. *Id.* at 291 (quoting Restatement (Second) of Agency § 14K
15 (1958)). Factors indicating that one is a supplier, rather than an
16 agent, are: "(1) That he is to receive a fixed price for the property
17 irrespective of the price paid by him. This is most important. (2)
18 That he acts in his own name and receives the title to the property
19 which he thereafter is to transfer. (3) That he has an independent
20 business in buying and selling similar property." *Id.* at 291-292
21 (quoting Restatement (Second) of Agency § 14K, Comment a (1958)).

22 The undisputed facts establish that there was never a
23 manifestation on the part of Nugget that Spencer Rock may act on
24 Nugget's account. Certainly, there was never any express agreement

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1 between Nugget and LaPore that LaPore or Spencer Rock would act as
2 Nugget's agent in the prosecution of Spencer Rock's work under the
3 Material Contract. In fact, the Material Contract, as modified by the
4 Support Agreement, on which Metco so extensively relies, details only
5 a legal, arms-length contractual relationship between two distinct
6 corporate entities and nowhere indicates that Spencer Rock or Mr.
7 LaPore may act on behalf of Nugget or otherwise empowers Spencer Rock
8 or LaPore to act on Nugget's behalf.

9 Significantly, Mr. Lapore was always at the helm of Spencer
10 Rock's operations and exclusively responsible for Spencer Rock's
11 finances, including during the period in which Nugget was assisting
12 Spencer Rock under the Support Agreement. Nugget's payments for work
13 under the Material Contract, which would have included a portion of
14 the work that Metco performed for Spencer Rock, were made exclusively
15 to Spencer Rock and never to Metco. Even when Metco approached Nugget
16 at the conclusion of Metco's performance regarding Spencer Rock's
17 nonpayment, Nugget never indicated that Nugget would be responsible
18 for Spencer Rock's debts to Metco. Mr. Lapore alone decided the
19 companies, including Metco, with which he would enter into contracts,
20 not Nugget. Mr. Lapore alone decided the means by which Spencer Rock
21 would be financed to facilitate Spencer Rock's performance, not
22 Nugget. Mr. Lapore alone was the sole beneficiary of Metco's
23 assistance to Spencer Rock - by way of maintenance services and
24 operators for Spencer Rock equipment and writing off all of the

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1 incurred overtime charges chargeable to Spencer Rock - during the
2 course of Metco's performance, not Nugget. And perhaps most
3 significant, Mr. Lapore alone determined that he would retain the
4 \$197,184.66 that Nugget paid Spencer Rock rather than disburse from
5 those funds the amount that Spencer Rock owed Metco for Metco's work
6 under its contract with Spencer Rock. Based on the guidance in the
7 Restatement and the relevant caselaw, these facts and circumstances
8 describe a relationship between Nugget and Spencer Rock as buyer-
9 supplier, and not principal-agent. *See, e.g., M.S.P. Indus., Inc. v.*
10 *Diversified Mortgage Servs., Inc.*, 777 P.2d 237 (Colo. App. 1989)
11 (finding absence of agency relationship under circumstances similar to
12 the relationship between Nugget and Spencer Rock).

13 This is consistent with the clear record, which establishes that
14 Metco's own understanding of the relationship between Nugget and
15 Spencer Rock was not one of principal and agent. Metco's own
16 admission in its July 31, 1997, letter to the U.S. Corps of Engineers
17 acknowledges that it was hired by Spencer Rock, not Nugget, to assist
18 Spencer Rock in handling and transporting rock materials. Metco never
19 asserted in that letter that Mr. LaPore or Spencer Rock acted on
20 behalf of Nugget in hiring Metco. Indeed, Metco does not seek payment
21 directly from Nugget; Metco instead advises that Spencer Rock cannot
22 pay Metco until Nugget pays Spencer Rock. This is consistent with
23 Metco's conduct during performance, during which Metco dealt directly
24 and only with Mr. LaPore and Spencer Rock, and never Nugget. *See*

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1 Krider Aff., Ex. 1, Dieckgraeff Dep., p. 10, lines 13-15, p. 11, lines
2 18-20, p. 12, lines 16-23, p. 13, lines 3-6, p. 32, lines 5-13.

3 Even in the absence of the foregoing, which unequivocally
4 establishes that Spencer Rock was never Nugget's agent, Metco would
5 still not be able to recover from Nugget on a theory of agency
6 because, under Alaska law, an undisclosed principal is not liable for
7 the acts of its agent.¹² See *Jensen v. Alaska Valuation Serv., Inc.*,
8 688 P.2d 161, 162-63 (Alaska 1984). Although an agent will not liable
9 if the principal is disclosed to a third party, when the principal is
10 not disclosed, liability rests on the agent, not the principal. See
11 *Vienna v. Scott Wetzel Servs., Inc.*, 740 P.2d 447, 452 (Alaska 1987).
12 Thus, to the extent that Metco's agency claim is predicated upon
13 Nugget's or Mr. LaPore's nondisclosure of the Support Agreement, such
14 claim would be squarely foreclosed by Metco's contemporaneous and
15 accurate understanding that Spencer Rock and LaPore were never agents
16 of Nugget, and that (as one would expect) no one informed Metco to the
17 contrary.

18 In sum, there was never an agency relationship between Nugget and
19 Spencer Rock, which is consistent not only with the facts and
20 circumstances surrounding the relationship between Nugget and Spencer
21 Rock, but also Metco's understanding of its relationship to Nugget and
22

23 ¹² This conclusion is entirely consistent with the Court's prior findings in
24 this case. See *United States ex rel. North Star Terminal & Stevedore Co., et*
25 *al. v. Nugget Construction, Inc., et al.*, Slip Op. No. A98-0009-CV (filed
Aug. 30, 2002), at 24, n. 38.

1 Spencer Rock. Beyond its empty allegations, Metco has not alleged a
2 single fact to support its claim that Nugget vested Spencer Rock or
3 LaPore with the necessary authority to act as Nugget's agent, or that
4 LaPore ceded control or responsibility of Spencer Rock to Nugget in
5 such a way as to sustain a claim that Spencer Rock became Nugget's
6 agent. Notably, the Support Agreement memorialized an arrangement
7 between Nugget and Spencer Rock in which the parties in effect agreed
8 to modify the Material Contract such that Nugget would be fairly
9 compensated for its assistance to Metco, nothing more.

10 Accordingly, in the absence of any genuine issue of material
11 fact, Nugget is entitled to summary judgment as a matter of law that
12 neither Spencer Rock nor LaPore acted as Nugget's agent.

13 G. Punitive damages are not only inappropriate but, also,
14 unallowable

15 Under Alaska law, punitive damages serve two purposes: "to
16 punish the wrongdoer and to deter the wrongdoer and others like him
17 from repeating the offensive act." *State Farm Mut. Auto. Ins. Co. v.*
18 *Weiford*, 831 P.2d 1264, 1266 (Alaska 1992) (citation omitted). The
19 availability of such damages "turn[s] on the wrongdoer's motive, state
20 of mind, and degree of culpability." *Alyeska Pipeline Serv. Co. v.*
21 *O'Kelley*, 645 P.2d 767, 774 (Alaska 1982). Punitive damages are a
22 harsh remedy "not favored in law. They are to be allowed only with
23 caution and within narrow limits." *State Farm*, 831 P.2d at 1266;
24 *Alyeska Pipeline Serv. Co. v. Beadles*, 731 P.2d 572, 574 (Alaska
25 1987).

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1 A plaintiff seeking punitive damages must "prove by clear and
2 convincing evidence that the defendant's conduct was outrageous, such
3 as acts done with malice, bad motive, or reckless indifference to the
4 interests of another." *Lee Houston & Assocs. v. Racine*, 806 P.2d 848,
5 856 (Alaska 1991). A showing of actual malice is not required, *Sturm*,
6 *Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454
7 U.S. 894, (1981), *overruled on other grounds*, *Dura Corp. v. Harned*,
8 703 P.2d 396 (Alaska 1985)); however, the plaintiff must establish, at
9 a minimum, that the defendant's conduct "amounted to reckless
10 indifference to the rights of others, and conscious action in
11 deliberate disregard of [those rights]." *State v. Haley*, 687 P.2d
12 305, 320 (Alaska 1984) (quoting *Sturm*, 594 P.2d at 47); *see also*
13 *State Farm*, 831 P.2d at 1266 ("Malice may be inferred if the acts
14 exhibit 'a callous disregard for the rights of others.'" (quoting
15 *Alyeska Pipeline Serv. Co.*, 645 P.2d at 774); *Hayes v. Xerox Corp.*,
16 718 P.2d 929, 934-35 (Alaska 1986) ("Conscious action in 'deliberate
17 disregard of [others] ... may provide the necessary state of mind to
18 justify punitive damages.'" (citation omitted)).

19 Even if it is proven that wrongdoing was intentionally committed,
20 this mere fact alone is not enough to sustain an award of punitive
21 damages. *See Alyeska Pipeline Serv. Co.*, 645 P.2d at 773-74. "By
22 their very nature, such damages turn on the wrongdoer's motive, state
23 of mind, and degree of culpability, rather than the particular tort
24 committed." *Id.* (citing K. Redden, *Punitive Damages* § 4.2 (1980)).

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1 Whether malice is present is a question of fact, and the trier of
2 fact is given broad discretion to grant or withhold punitive damages.
3 *See Haskins v. Sheldon*, 558 P.2d 487, 494 (Alaska 1976); *Schafer v.*
4 *Schnabel*, 494 P.2d 802, 805 (Alaska 1972). "But where there is no
5 evidence that gives rise to an inference of actual malice or conduct
6 sufficiently outrageous to be deemed equivalent to actual malice, the
7 trial court need not submit the punitive damages issue to the jury.
8 Indeed, submitting the issue to the jury in such a situation may
9 constitute reversible error." *Alyeska Pipeline Serv. Co.*, 645 P.2d at
10 774.

11 Metco boldly alleges that it is entitled to \$1,000,000 in
12 punitive damages - an amount staggeringly disproportionate to Metco's
13 prayer for \$36,785.27 in actual damages - from "each of the
14 defendants," and "especially Nugget." Metco's Amended Complaint, ¶
15 39. Yet, Metco has not offered any fact that would "prove by clear
16 and convincing evidence that [Nugget's] conduct was outrageous, such
17 as acts done with malice, bad motive, or reckless indifference to the
18 interests of another." *Lee Houston & Assocs.*, 806 P.2d at 856.
19 Nugget entered into an arms-length agreement with Spencer Rock, the
20 purpose and terms of which are clear from the face of the document,
21 and then conducted itself consistent with that agreement. Even if
22 Metco takes issue with this fact, the testimony of Metco's own
23 corporate designee belies the sort of outrageous or malicious conduct
24 alleged by Metco in its Amended Complaint:

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1 Q. If Nugget, in fact, paid LaPore for the rock, do you
believe they should have to pay twice for that rock?

2 A. Well, they should have - if Nugget did pay LaPore,
3 which Randy told me they did not, but if they had paid
4 LaPore, then they should have insisted on getting
something from LaPore saying he paid his bills. He
5 didn't.

6 Q. You don't believe that he did that?

7 A. I don't think he got the money.

8 Q. Okay. If he got the money, would that change your
view towards Nugget?

9 A. Not really, because it was Nugget's responsibility to
make sure the bills were paid. They were the big guy
and they had to make sure that all this stuff was
handled in a kosher way.

10 Q. Do you have any other reasons why you believe Nugget
acted improperly in this entire process?

11 A. That says it all, the fact that they did not follow
12 through with anything and that they were aware of it.

13 Krider Aff., Ex. 1, Dieckgraeff Dep., p. 36, lines 8-25, p. 37, line
14 1. This exchange demonstrates that the essence of Metco's claim
15 against Nugget lies in Metco's belief that it was Nugget's
16 responsibility to ensure that Spencer Rock paid Metco, and not that
17 Nugget orchestrated a complex conspiracy to avoid liability to Spencer
18 Rock's suppliers.

19 As previously discussed, Metco's belief in this regard was and is
20 directly linked to its erroneous understanding that Nugget should be
21 liable to Metco because the Homer Spit project was a bonded job.
22 There is no factual allegation, much less clear and convincing
23 evidence, of outrageous conduct, or conduct recklessly indifferent to
24 Metco's interests. Rather, there is only the unfounded belief that it

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1 was "Nugget's responsibility to make sure the bills were paid." *Id.*
2 In fact and at law, Nugget bears no such responsibility; the discharge
3 of Spencer Rock's debts to Metco is a responsibility that Spencer Rock
4 bears alone.

5 Conclusion

6 Metco is certainly within its rights to pursue payment for the
7 work it performed on the Project. Metco refuses to acknowledge,
8 however, that it should not be pointing its finger in Nugget's
9 direction; rather it should be pointing at Mr. LaPore and Spencer
10 Rock. The undisputed facts demonstrate that Metco never relied to its
11 detriment on any act or omission of Nugget in entering into and
12 performing its contract with Spencer Rock, as well as that Nugget sits
13 similarly situated to Metco, in that Nugget also sustained significant
14 financial losses as a result of its dealings with Spencer Rock.

15 Metco may have once occupied a sympathetic position, but this
16 position has since been overshadowed by Metco's overtly opportunistic
17 conduct in these proceedings. There can be only one reason why
18 Metco's current state law claims were not raised back in 1998, which
19 is that Metco knew then, as it knows now, that such claims were
20 groundless. The testimony of Metco's corporate designee, as well as
21 Metco's recent discovery responses, tell the same story: despite the
22 Ninth Circuit's prior ruling, Metco nevertheless clutches to the
23 belief that Nugget is liable to Metco simply because the Homer Spit
24 Project was a bonded job. Rather than accept the law of the case and
25

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1 redirect its efforts toward more constructive ends, Metco instead
2 alleges unsupported facts on which to posit inapposite theories, while
3 also attempting to grossly inflate its recovery with allegations of
4 outrageous conduct and reckless indifference that have no place in
5 these proceedings whatsoever.

6 Metco has had its day in court and lost when Spencer was
7 determined to be a supplier. Metco may have another opportunity to
8 prove yet another lately-conceived and alternative theory of recovery
9 under the federal Miller Act. Metco's state law claims, however, are
10 clearly not burdened by any genuine issues of material fact; as such,
11 for the reasons stated herein, Nugget is entitled to summary judgment
12 as a matter of law.

13 Dated: April 24, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th
day of April, 2006, a true and correct
copy of the foregoing was served

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P JAD Memo in Support of MSJ Metco State Law 99310.0002

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